

REFERENCE TITLE: **workers' compensation; earning capacity; determination**

State of Arizona
House of Representatives
Forty-ninth Legislature
First Regular Session
2009

HB 2422

Introduced by
Representatives Reagan, McComish

AN ACT

**AMENDING SECTIONS 23-1044 AND 23-1047, ARIZONA REVISED STATUTES; RELATING TO
WORKERS' COMPENSATION.**

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 23-1044, Arizona Revised Statutes, is amended to
3 read:

4 23-1044. Compensation for partial disability: computation:
5 definition

6 A. For temporary partial disability there shall be paid during the
7 period thereof sixty-six and two-thirds per cent of the difference between
8 the wages earned before the injury and the wages which the injured person is
9 able to earn thereafter. Unemployment benefits received during the period of
10 temporary partial disability and fifty per cent of retirement and pension
11 benefits received from the insured or self-insured employer during the period
12 of temporary partial disability shall be considered wages able to be earned.
13 IF EMPLOYMENT IS AVAILABLE TO THE EMPLOYEE BUT FOR THE MISCONDUCT OF THE
14 EMPLOYEE, THE WAGES THAT COULD HAVE BEEN EARNED FROM THAT EMPLOYMENT SHALL BE
15 CONSIDERED AS WAGES EARNED BY THE EMPLOYEE.

16 B. Disability shall be deemed permanent partial disability if caused
17 by any of the following specified injuries, and compensation of fifty-five
18 per cent of the average monthly wage of the injured employee, in addition to
19 the compensation for temporary total disability, shall be paid for the period
20 given in the following schedule:

21 1. For the loss of a thumb, fifteen months.

22 2. For the loss of a first finger, commonly called the index finger,
23 nine months.

24 3. For the loss of a second finger, seven months.

25 4. For the loss of a third finger, five months.

26 5. For the loss of the fourth finger, commonly called the little
27 finger, four months.

28 6. The loss of a distal or second phalange of the thumb or the distal
29 or third phalange of the first, second, third or fourth finger, shall be
30 considered equal to the loss of one-half of the thumb or finger, and
31 compensation shall be one-half of the amount specified for the loss of the
32 entire thumb or finger.

33 7. The loss of more than one phalange of the thumb or finger shall be
34 considered as the loss of the entire finger or thumb, but in no event shall
35 the amount received for more than one finger exceed the amount provided for
36 the loss of a hand.

37 8. For the loss of a great toe, seven months.

38 9. For the loss of a toe other than the great toe, two and one-half
39 months.

40 10. The loss of the first phalange of any toe shall be considered equal
41 to the loss of one-half of the toe and compensation shall be one-half of the
42 amount for one toe.

43 11. The loss of more than one phalange shall be considered as the loss
44 of the entire toe.

1 12. For the loss of a major hand, fifty months, or of a minor hand,
2 forty months.

3 13. For the loss of a major arm, sixty months, or of a minor arm, fifty
4 months.

5 14. For the loss of a foot, forty months.

6 15. For the loss of a leg, fifty months.

7 16. For the loss of an eye by enucleation, thirty months.

8 17. For the permanent and complete loss of sight in one eye without
9 enucleation, twenty-five months.

10 18. For permanent and complete loss of hearing in one ear, twenty
11 months.

12 19. For permanent and complete loss of hearing in both ears, sixty
13 months.

14 20. The permanent and complete loss of the use of a finger, toe, arm,
15 hand, foot or leg may be deemed the same as the loss of any such member by
16 separation.

17 21. For the partial loss of use of a finger, toe, arm, hand, foot or
18 leg, or partial loss of sight or hearing, fifty per cent of the average
19 monthly wage during that proportion of the number of months in the foregoing
20 schedule provided for the complete loss of use of such member, or complete
21 loss of sight or hearing, which the partial loss of use thereof bears to the
22 total loss of use of such member or total loss of sight or hearing. In this
23 paragraph, "loss of use" means a loss of physical function of the affected
24 member, sight or hearing. The effect on an employee's ability to return to
25 the employee's occupation at the time of the injury shall not be considered
26 in establishing the percentage of loss under this section, except that if the
27 employee is unable to return to the work the employee was performing at the
28 time the employee was injured due to the total or partial loss of use,
29 compensation pursuant to this section shall be calculated based on
30 seventy-five per cent of the average monthly wage.

31 22. For permanent disfigurement about the head or face, which shall
32 include injury to or loss of teeth, the commission may, in accordance with
33 the provisions of section 23-1047, allow such sum for compensation thereof as
34 it deems just, in accordance with the proof submitted, for a period of not to
35 exceed eighteen months.

36 C. In cases not enumerated in subsection B of this section, if the
37 injury causes permanent partial disability for work, the employee shall
38 receive during such disability compensation equal to fifty-five per cent of
39 the difference between the employee's average monthly wages before the
40 accident and the amount which represents the employee's reduced monthly
41 earning capacity resulting from the disability, but the payment shall not
42 continue after the disability ends, or the death of the injured employee, and
43 in case the partial disability begins after a period of total disability, the
44 period of total disability shall be deducted from the total period of
45 compensation.

1 D. IF THE EMPLOYEE IS UNABLE TO RETURN TO OR CONTINUE WORKING IN ANY
2 EMPLOYMENT AFTER THE INJURY DUE TO THE EMPLOYEE'S MISCONDUCT, THE COMMISSION
3 MAY CONSIDER THE WAGES THE EMPLOYEE COULD HAVE EARNED FROM THAT EMPLOYMENT AS
4 REPRESENTATIVE OF THE EMPLOYEE'S EARNING CAPACITY.

5 ~~D.~~ E. In determining the amount which represents the reduced monthly
6 earning capacity for the purposes of subsection C of this section,
7 consideration shall be given, among other things, to any previous disability,
8 the occupational history of the injured employee, the nature and extent of
9 the physical disability, the type of work the injured employee is able to
10 perform subsequent to the injury, any wages received for work performed
11 subsequent to the injury and the age of the employee at the time of injury.

12 ~~E.~~ F. In case there is a previous disability, as the loss of one eye,
13 one hand, one foot or otherwise, the percentage of disability for a
14 subsequent injury shall be determined by computing the percentage of the
15 entire disability and deducting therefrom the percentage of the previous
16 disability as it existed at the time of the subsequent injury.

17 ~~F.~~ G. For the purposes of subsection C of this section, the
18 commission ~~shall~~, in accordance with the provisions of section 23-1047 when
19 the physical condition of the injured employee becomes stationary, ~~shall~~
20 determine the amount which represents the reduced monthly earning capacity
21 and upon such determination make an award of compensation which shall be
22 subject to change in any of the following events:

23 1. Upon a showing of a change in the physical condition of the
24 employee subsequent to such findings and award arising out of the injury
25 resulting in the reduction or increase of the employee's earning capacity.

26 2. Upon a showing of a reduction in the earning capacity of the
27 employee arising out of such injury where there is no change in the
28 employee's physical condition, subsequent to the findings and award.

29 3. Upon a showing that the employee's earning capacity has increased
30 subsequent to such findings and award.

31 ~~G.~~ H. The commission may adopt a schedule for rating loss of earning
32 capacity and reasonable and proper rules to carry out the provisions of this
33 section. In all cases involving this section, except for cases under
34 subsection B of this section, or in cases involving a request pursuant to
35 section 23-1061, subsection J for disability compensation, if any issue is
36 raised regarding whether the injured employee has suffered a loss of earning
37 capacity because of an inability to obtain or retain suitable work, the
38 following apply:

39 1. The employer or carrier may present evidence showing that the
40 inability to obtain suitable work is due, in whole or in part, to economic or
41 business conditions, or other factors unrelated to the industrial injury.
42 The injured employee may present evidence showing that the inability to
43 obtain suitable work is due, in whole or in part, to the industrial injury or
44 limitations resulting from the injury. The administrative law judge shall

1 consider all such evidence in determining whether and to what extent the
2 injured employee has sustained any loss of earning capacity.

3 2. In cases involving loss of employment, the employer or carrier may
4 present evidence showing that the injured employee was terminated from
5 employment or has not obtained suitable work, or both, due, in whole or in
6 part, to economic or business conditions, or other factors unrelated to the
7 injury. The injured employee may present evidence showing that such
8 termination or inability to obtain suitable work is due, in whole or in part,
9 to the industrial injury or limitations resulting from the injury. The
10 administrative law judge shall consider all such evidence in determining
11 whether and to what extent the injured employee has sustained any loss or
12 additional loss of earning capacity.

13 ~~H.~~ I. Any single injury or disability that is listed in subsection B
14 of this section and that is not converted into an injury or disability
15 compensated under subsection C of this section by operation of this section
16 shall be treated as scheduled under subsection B of this section regardless
17 of its actual effect on the injured employee's earning capacity.

18 J. FOR THE PURPOSES OF THIS SECTION, "MISCONDUCT" MEANS ANY OF THE
19 FOLLOWING:

20 1. ABSENCE FROM WORK WITHOUT EITHER NOTICE TO THE EMPLOYER OR GOOD
21 CAUSE FOR FAILING TO GIVE NOTICE, REPEATED ABSENCE FROM WORK WITHOUT GOOD
22 CAUSE WHEN WARNINGS REGARDING REPEATED ABSENCE HAVE BEEN RECEIVED FROM THE
23 EMPLOYER, FREQUENT ABSENCES FROM WORK WITHOUT GOOD CAUSE, FAILURE TO RETURN
24 TO WORK FOLLOWING AN AUTHORIZED LEAVE, VACATION, SICK LEAVE OR OTHER LEAVE OF
25 ABSENCE WHEN THE FAILURE IS WITHOUT PERMISSION FROM THE EMPLOYER OR REPEATED
26 FAILURE WITHOUT GOOD CAUSE TO EXERCISE DUE CARE FOR PUNCTUALITY OR ATTENDANCE
27 IN REGARD TO THE SCHEDULED HOURS OF WORK ESTABLISHED BY THE EMPLOYER.

28 2. INTOXICATION, WHETHER FROM THE USE OF INTOXICATING LIQUOR OR THE
29 USE OF ILLEGAL DRUGS, ON THE EMPLOYER'S PREMISES OR WHEN REPORTING TO WORK,
30 OR, DUE TO INTOXICATION OR THE AFTEREFFECTS OF INTOXICATION, FREQUENT
31 ABSENCES, SLEEPING ON THE EMPLOYER'S PREMISES DURING SCHEDULED WORK HOURS OR
32 INEFFICIENCY OR INABILITY TO PERFORM THE EMPLOYMENT.

33 3. FAILURE TO PASS OR THE REFUSAL TO TAKE A DRUG TEST OR ALCOHOL
34 IMPAIRMENT TEST ADMINISTERED UNDER CHAPTER 2, ARTICLE 14 OF THIS TITLE.

35 4. INSUBORDINATION, DISOBEDIENCE, REPEATED AND INAPPROPRIATE USE OF
36 ABUSIVE LANGUAGE, ASSAULT ON ANOTHER EMPLOYEE OR REPEATED FIGHTING, REFUSAL
37 TO ACCEPT AN ASSIGNMENT TO WORK AT CERTAIN TIMES OR TO PERFORM CERTAIN DUTIES
38 WITHOUT GOOD CAUSE, REFUSAL TO FOLLOW THE EMPLOYER'S REASONABLE AND PROPER
39 INSTRUCTIONS OR INTENTIONAL OR NEGLIGENT DESTRUCTION OF THE EMPLOYER'S
40 PROPERTY.

41 5. DISHONESTY, MATERIAL FALSIFICATION OF EMPLOYMENT APPLICATIONS OR
42 OTHER WRITTEN DOCUMENTS RELATING TO OBTAINING OR RETAINING EMPLOYMENT,
43 FALSIFICATION OF TIME RECORDS OR WORK RECORDS, THEFT OR CONVERSION OF
44 PROPERTY OF THE EMPLOYER OR UNTRUTHFULNESS RELATED TO THE EMPLOYMENT THAT MAY
45 SUBSTANTIALLY INJURE OR JEOPARDIZE THE EMPLOYER'S INTEREST.

1 6. ADMISSION OF OR CONVICTION FOR ANY FELONY OR CRIME THAT IS RELATED
2 TO THE EMPLOYER'S BUSINESS OR TO THE EMPLOYMENT OR THAT MAY HAVE A
3 SUBSTANTIAL ADVERSE EFFECT ON THE EMPLOYER'S INTEREST, PUBLIC RELATIONS OR
4 TRUST UNLESS THE EMPLOYER HAD ACTUAL KNOWLEDGE OF THE ADMISSION OR CONVICTION
5 AT THE COMMENCEMENT OF THE EMPLOYMENT.

6 7. VIOLATING WITHOUT GOOD CAUSE ANY SAFETY RULE OR ANY FEDERAL OR
7 STATE OCCUPATIONAL SAFETY AND HEALTH LAW, REGULATION OR DIRECTIVE THAT IS
8 REASONABLY IMPOSED AND COMMUNICATED BY THE EMPLOYER PURSUANT TO CHAPTER 2,
9 ARTICLE 10 OF THIS TITLE.

10 Sec. 2. Section 23-1047, Arizona Revised Statutes, is amended to read:

11 23-1047. Procedure for determining compensation for partial
12 disability and permanent total disability in cases
13 not enumerated; procedure for determining
14 nonscheduled dependency and duration of compensation
15 to partial dependents in death cases

16 A. In cases of permanent partial disability under section 23-1044,
17 subsection B, paragraph 22 and subsections C and ~~F~~ G, when the physical
18 condition of the injured employee becomes stationary, or in the case of
19 permanent total disability not enumerated in section 23-1045, and under
20 section 23-1045, subsection D, or in death cases under section 23-1046,
21 subsection B, the employer or insurance carrier within thirty days shall
22 notify the commission and request that the claim be examined and further
23 compensation, if any, be determined. A copy of all medical reports necessary
24 to make such determination also shall be furnished to the commission. The
25 employer or insurance carrier may commence payment of a permanent disability
26 award without waiting for a determination under subsection B of this section.

27 B. Within thirty days after the commission receives the medical
28 reports, the claims shall be examined and further compensation, including a
29 permanent disability award, if any, determined under the commission's
30 supervision. If necessary, the commission may require additional medical or
31 other information with respect to the claim and may postpone the
32 determination for not more than sixty additional days. Any determination
33 under this subsection may include necessary adjustments in any compensation
34 paid or payable.

35 C. The commission shall mail a copy of the determination to all
36 interested parties. Any such party may request a hearing under section
37 23-941 on the determination made under subsection B of this section within
38 ninety days after copies of the determination are mailed.

39 D. Any person receiving permanent compensation benefits shall report
40 annually on the anniversary date of the award to the self-insured employer or
41 insurance carrier all of the person's earnings for the prior twelve-month
42 period. In the event the person fails to make such report the self-insured
43 employer or insurance carrier shall notify the person that such report has
44 not been received and that payment of further benefits will be suspended
45 unless such report of earnings is filed within thirty days. After thirty

1 days have elapsed from the date of such notice, the self-insured employer or
2 insurance carrier may issue a notice to the person suspending payment of
3 further benefits and no further payments need be made until such report of
4 earnings is filed.

5 E. Any person receiving permanent compensation benefits from the
6 special fund established by section 23-1065 shall report annually on the
7 anniversary date of the award to the industrial commission all of the
8 person's earnings for the prior twelve-month period. In the event the person
9 fails to make such report the industrial commission shall notify the person
10 that such report has not been received and that payment of further benefits
11 will be suspended unless such report of earnings is filed within thirty days.
12 After thirty days have elapsed from the date of such notice, the industrial
13 commission may issue a notice to the person suspending payment of further
14 benefits and no further payments need be made until such report of earnings
15 is filed.